

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Amendment of the Commission's Rules Regarding)
Installment Payment Financing for Personal)
Communications Services (PCS) Licensees)
)
Request For Rule Waiver To Qualify)
As A "Very Small Business" For)
FCC Auction #22)

WT Docket No. 97-82

DA 99-332

To: The Commission

RECEIVED
MAR 15 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

APPLICATION FOR REVIEW

Mark J. Tauber
Mark J. O'Connor

Piper & Marbury L.L.P.
1200 Nineteenth Street, N.W., Suite 700
Washington, D.C. 20036
(202) 861-3900

Attorneys for Omnipoint Corporation

Date: March 15, 1999

No. of Copies rec'd 014
List A B C D E

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction and Summary	1
II. Questions Presented on Application for Review	2
III. Factual Background	3
IV. Argument	8
A. The Waiver Denial if Contrary to the Commission's Orders and Policies Encouraging Small Business Participation in Broadband PCS.	8
B. The Waiver Denial Failed To Adequately Consider the Special Circumstances Justifying a Waiver In This Case	17
V. Conclusion	21

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of the Commission's Rules Regarding)	WT Docket No. 97-82
Installment Payment Financing for Personal)	
Communications Services (PCS) Licensees)	
)	
Request For Rule Waiver To Qualify)	DA 99-332
As A "Very Small Business" For)	
FCC Auction #22)	

To: The Commission

APPLICATION FOR REVIEW

Omnipoint Corporation, by its attorneys and pursuant to Section 1.115 of the Commission's rules, files this application for review of the Auctions and Industry Analysis Division, Wireless Telecommunications Bureau Letter, DA 99-332 (rel. Feb. 12, 1999) ("Waiver Denial," attached hereto as Exhibit A). The Waiver Denial improperly and arbitrarily denied Omnipoint's January 29, 1999 "Request for Rule Waiver" of Section 24.712 of the Commission's rules ("Waiver Request," attached hereto as Exhibit B). Omnipoint asks the Commission to grant its Waiver Request and let it participate with the same 25% bid credit that all of the largest bidders in Auction #22 have been granted. Omnipoint does not object that all of the other bidders in Auction #22 placing deposits of more than \$10 million obtain a 25% bid discount, even though they are backed by very large investors. We believe it is unfair however for Omnipoint to be penalized in this Auction simply for having grown its PCS business during the delay that the Commission introduced to the reaction.

I. Introduction and Summary

Omnipoint requested relief from Section 24.712 of the Commission's rules so that it could participate in Auction # 22 with a 25% bid credit, as a "very small business." The Waiver Request demonstrated that such relief was warranted on two independent grounds. First, the public interest in competitive, small business participation in the auction process, the intent of the original PCS rules to encourage entrepreneur company growth, Omnipoint's ability to acquire the same licenses through the post-auction transfer/assignment process, and the lack of possible harm to other bidders all demonstrate the public interest favors Omnipoint's requested relief. Second, special circumstances - the delay of Block C spectrum auctioning due to the Commission's restructuring decisions, the promise in those decisions of meaningful equity to all restructured licensees, including operational licensees, and the unique impact of the Fourth R&O¹ decision on Omnipoint's status – justify relief in this case.

As discussed in greater detail below, the Auctions Division erred in denying the Waiver Request. The Auctions Division failed to properly weigh the public interest to be advanced by Omnipoint's request, by misapplying the Commission's orders concerning "unjust enrichment" and Block C licensees. In addition, the Auctions Division failed to take into account the special circumstances – especially the impact of the Commission's own restructuring decisions – that independently warrant a waiver in this case.

On review, Omnipoint asks the Commission to grant the Waiver Request by the start of bidding (March 23) and permit Omnipoint to participate in the ongoing Auction # 22 as a "very small business" entitled to a 25% bid credit on Block C licenses. In Omnipoint's view, it has

¹ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Fourth Report and Order, WT 97-82, 13 FCC Rcd. 15,743 (1998) ("Fourth R&O").

presented two alternative and compelling cases for waiver and the Commission may agree with either or both in order to provide Omnipoint with the relief requested.

II. Questions Presented on Application for Review

1. Did the Waiver Denial misconstrue the “unjust enrichment” provisions that apply to holders of “small business” Block C licenses? Did such error then lead the Auctions Division to fail to adequately consider the public interest favoring a grant of Omnipoint’s Waiver Request?
2. Did the Waiver Denial inadequately consider the special circumstances supporting Omnipoint’s Waiver Request, including the significant delay of Block C spectrum resulting directly from the Commission’s Block C restructuring decisions, the promise of equitable treatment for all Block C licensees and especially operational licensees in the restructuring process, and the disparate impact of the Fourth R&O decision on Omnipoint?

III. Factual Background

Omnipoint participated as a small business in the Block C auction and as a very small business in the Block F auction, receiving a 25 percent bid credit in each auction.² As the Commission is well aware, virtually all successful broadband PCS entrepreneurs in those auctions qualified for the maximum bid credit, which put all serious bidders *on a par with one another*.³ As the Commission well knows, the parties that dominated past auctions amassed enormous bidding funds while qualifying for the Commission’s “small business” or “very small business” status. Indeed, one bidder managed to raise more than \$500 million solely for bidding

² Omnipoint, through its subsidiaries, holds four Block C licenses, and 117 Block D, E, and F licenses, of which 50 are Block F entrepreneurial licenses. For the last three years for which Omnipoint has audited financial statements, its average gross revenues are \$17.5 million.

³ See, e.g., “Entrepreneurs Block Auction Closes,” Public Notice, DA 96-716, Attachment A (rel. May 8, 1996) (of the 255 applicants for the Block C auction, 253 qualified as “small businesses;” all 89 of the Block C auction winners qualified as “small businesses”).

purposes, not for operational expenditures, and received a 25% bid discount due to a lack of revenues. (In contrast, Omnipoint had only \$15 million for bidding purposes at the beginning of the Block C auction and was forced to raise an additional \$35 million due to the high prices).

Unlike virtually any other Block C licensee, shortly after receiving its licenses as a “small business,” Omnipoint began to build out its PCS systems, including Philadelphia, the only Block C license launched of the top 25 cities in America. This rapid build out is consistent with Congress’ goal in establishing the auctions as a means of disseminating licenses to promote rapid deployment of competitive wireless services.⁴ Omnipoint has experienced revenue growth as a result of its operational PCS systems. Omnipoint had no gross revenues in 1994 or 1995 and gross revenues in 1996 only of \$531,000.⁵ Thus all of Omnipoint’s revenue growth is a direct result of Omnipoint’s deployment of commercial broadband PCS networks, in competition with other mobile telephony providers.

These increased gross revenues go toward paying Omnipoint’s expenses associated with actual system build-out and operations; Omnipoint also undertakes significant debt, far in excess of its revenues, to finance the build-out and operation of its broadband PCS systems. Unlike most other bidders in the original Block C auction, Omnipoint has moved forward for the past several years with significant and costly deployment of broadband PCS networks in many

4 47 U.S.C. § 309(j)(3)(A).

5 FCC Form 175 of OPCS Three, LLC for Auction #22 (filed Feb. 12, 1999); see also FCC Form 600 of Omnipoint Lebanon License, Inc. for Block C License #PBB249C. Auction Event

(Footnote continued to next page)

markets, in addition to Philadelphia, such as, Miami and Detroit, where Omnipoint holds Block F Entrepreneur licenses. This is a burden that non-operational Block C licensees do not share.

As Omnipoint was engaged in system build-out, and not at Omnipoint's request, the Commission stayed all Block C payments beginning in March, 1997, and F Block payments beginning in April, 1997, until July, 1998.⁶ The Commission took these deferral actions on the basis of notification from some original Block C auction winners prior to their first license payment that they would be unable to make a payment; absent payment deferral, those licensees threatened massive defaults and, arguably, the viability of the Block C program itself. Coinciding with the suspension of license payments and beginning in June, 1997, the Commission commenced its proceeding to restructure Block C debt. Throughout the proceeding, the Commission's priority was to balance the policy goals of maintaining auction integrity with ensuring fairness to all auction participants, including high bidders in the original auction.⁷

The Block C Election Date was originally slated for January 15, 1998, then moved to February 26, 1998, and ultimately scheduled for June 8, 1998. Once the Elections were made, the Commission intended to promptly re-auction the licenses, reiterating its assertion that rapid

(Footnote continued from previous page)

#5 (filed May 22, 1996); FCC Form 600 of Omnipoint MI-Indiana Area DE License, Inc. for Block F License #CWB474F, Auction #11 (filed January 30, 1997).

⁶ "Wireless Telecommunications Bureau Announces 1998 Election Date for Broadband PCS C Block Licensees; Payments for C and F Block Licenses Resume July 31, 1998," Public Notice, DA 98-741 (rel. April 17, 1998).

⁷ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Service (PCS) Licensees, Second Report and Order and Further

(Footnote continued to next page)

licensing is in the public interest.⁸ From the start of this proceeding, Omnipoint maintained that the Commission must ensure fairness to those that had participated in prior auctions and must be willing to reconcile the effects of the restructuring process itself on the operational licensees that choose service to the public over regulatory posturing.

Throughout the entire Block C restructuring proceeding, the Commission apparently agreed with Omnipoint and reiterated the need to ensure that operational licensees have viable options available to them.⁹ Specifically, the Commission tailored restructuring exceptions for operational licensees that would “facilitate[] the achievement of the statutory goal set forth in Section 309(j) that encourage[s] the rapid provision of service to the public”¹⁰ The Commission further stated its interest in minimizing the competitive impact on operational licensees of changes made to existing auction rules, “consistent with its broader policy objectives.”¹¹ The Commission noted that rules specifically crafted for operational licensees are “one method by which we can ensure that the menu of options available . . . is fair to those

(Footnote continued from previous page)

Notice of Proposed Rulemaking, WT Dkt. No. 97-82, 12 FCC Rcd. 16436, 16437 (1997) (“Second R&O”).

8 Id. at 16438.

9 Id. at 16463.

10 Id.

11 Id.

licensees that have rapidly built-out their markets and initiated [the] provision of competitive service.”¹²

On June 8, 1998, pursuant to the Commission’s decisions on Block C debt restructuring, Omnipoint chose to “disaggregate” 4 of its Block C licenses and to “amnesty” 14 of its 18 Block C licenses, with the right to re-bid on the spectrum surrendered under the amnesty option in a subsequent re-auction. However, on August 19, 1998, 51 days *after* the Election Date, the Commission released the Fourth R&O, and decided for the first time that “eligibility for bidding credits [in the re-auction] will be determined at the deadline for filing short-form applications.”¹³ The Commission provided original C Block licensees making election decisions with no prior notice that they would need to re-qualify for bidding credits for the subsequent re-auction.¹⁴ On October 23, 1998, Omnipoint filed a Petition for Reconsideration which primarily seeks review of the Commission’s decision at ¶ 47 of the Fourth R&O. Since that time, no party has commented, informally or formally, on the issues raised in Omnipoint’s Petition. On January 29, 1999, Omnipoint filed the Waiver Request and, like the Petition, no party commented on it.

On February 12, 1999, Omnipoint filed its short-form application to participate in Auction # 22 and, earlier that same day, Bureau staff sent a copy of the Waiver Denial. Due to

12 Id.

13 Fourth R&O at ¶ 47.

14 While the Further Notice (see Second R&O at ¶ 100) tentatively proposed a tiered bidding credit approach for the re-auction, it did not explain how applicants would be assessed such bidding credits in the re-auction. Therefore, as of the time of the Election Date, the

(Footnote continued to next page)

the growth of its PCS business, Omnipoint can qualify as a “small business,” but not as a “very small business” in the re-auction, as defined by 47 C.F.R. §§ 24.720(b)(1), 1.2110(m). Thus, Omnipoint is at a bid premium disadvantage of 17.6 percent compared to “very small business” auction participants.¹⁵

IV. Argument

A. The Waiver Denial Is Contrary to the Commission’s Orders and Policies Encouraging Small Business Participation in Broadband PCS.

In the Waiver Request, Omnipoint argued that the relief requested would serve the public interest better than the application of the general rule of the Fourth R&O. Fundamentally, the requested relief would provide Omnipoint with the ability to compete on an even playing field with other auction participants for Block C licenses. Omnipoint based its concern for parity with other bidders on the experience of the short-form filings and high-bidder results in prior Block C and F auctions, where the vast majority of broadband PCS Entrepreneur Band applicants qualified for the maximum bid credit. The relief requested would not harm other bidders in the auction because Omnipoint was seeking parity, not a relative advantage, with other bidders and because other bidders have in the past demonstrated an ability to amass significant funding, yet

(Footnote continued from previous page)

Commission offered no clear statement that bidders should expect bid credits to be based on an applicants qualification “at the deadline for filing short-form applications.”

¹⁵ A premium is derived from the fact that some bidders will obtain a 25 percent bid credit while operational licensees with average gross revenues of \$40 million or less will obtain a bid credit of 15 percent. The resulting premium cost will be 17.6 percent above the bid prices paid by “very small business” participants. Omnipoint had only \$1.62 million in revenue in 1993, no revenues in 1994 and 1995, only \$513,000 in 1996, and \$51.9 million in 1997.

still qualify for the maximum bid credit. Thus, Omnipoint's participation with a 25% bid credit in Auction # 22 would not cause harm to "competing small business bidders and licensees," which was the Commission's underlying concern in the Fourth R&O (at ¶ 47). The fact that no party has yet objected to Omnipoint's October 23, 1998 Petition for Reconsideration or its January 29 Waiver Request further supports that no other party is concerned about harm from Omnipoint's participation in the auction.

Moreover, the Waiver Request explained that the essential purposes of the auctions would be frustrated by denying Omnipoint's requested relief. Since Omnipoint held Block C licenses associated with a 25% bid discount from the initial Block C auction, and the Commission had clearly held that such licensees *were not subject to* "unjust enrichment" penalties in future transfers or assignments, it would serve no purpose to deter Omnipoint from obtaining licenses in the auction and to encourage acquisition of those same licenses in post-auction transactions.

The Waiver Denial (at 2-4) disagreed with both Omnipoint positions and, in so doing, erred in its legal and policy analysis of the issues.

First, Omnipoint's concern for bid credit parity with other Block C auction participants in Auction # 22, and the lack of harm to other bidders, are not "merely an untested assertion," as the Auctions Division contends, but are patently obvious from the Commission's prior Block C auctions. In each prior Block C auction, all winning bidders have qualified for the maximum bid

credit.¹⁶ Indeed, even in Auction # 22, all of the other largest bidders based on upfront deposits (e.g., those with more than \$10 million) qualify for the fullest bid credit for Block C licenses.¹⁷ It is equally obvious that, despite the Commission's "endeavor[s] to define legitimate small businesses" (Waiver Denial at 2), Block C bidders can amass and use huge reserves for bidding purposes to outbid other small business bidders. Thus, Omnipoint's full participation will add to the competitiveness of the auction, which is certainly in the public interest. 47 U.S.C. § 309(j)(3)(B) & (4)(D).

In addition, the Auctions Division's disagreement with the public interest factors favoring relief in this case stems from the Auction Division's misunderstanding of the "unjust enrichment" provisions. For example, the Auctions Division mischaracterizes Omnipoint's position on unjust enrichment as an "exception to the Commission's bidding credit unjust enrichment rules," and then asserts that "Omnipoint's belief in the existence of such an exception is misguided." Waiver Denial at 3. Omnipoint respectfully submits that it has never argued a purported "exception" to the unjust enrichment provisions. What the Auctions Division has perhaps failed to appreciate is the inherent tension that would otherwise exist between the Commission's policies supporting small business participation in the auctions and encouraging

¹⁶ See, n.3, *infra*; "FCC Announces Winning Bidders in the Reauction of 18 Licenses to Provide Broadband PCS in BTAs: Auction Event No. 10", Public Notice, DA 96-1153, 11 FCC Rcd. 8183, Attachment A.

¹⁷ Omnipoint bases this fact on its review of the initial FCC Form 175's filed with the Commission on February 12, 1999, and made available to Omnipoint and other bidders several days after the release of the Waiver Denial. See "Auction of 356 Broadband PCS Licenses – 66 Qualified Bidders," Public Notice, DA 99-482, Att. A (rel. March 10, 1999).

growth in the licensed services, with the Commission's unjust enrichment provisions. This tension between the two competing policies was resolved by the Commission's clarification of the scope of the unjust enrichment provisions in the Fifth MO&O (at ¶ 126):

*we clarify that . . . we will allow licensees to transfer a [Block C or F] license to any entity that either holds other entrepreneurs' block licenses (and thus at the time of the auction satisfied the entrepreneurs' block criteria) or that satisfies the criteria at the time of transfer. Unjust enrichment penalties (as described above) apply if these requirements are not met, or if they qualified for different provisions at the time of licensing. For purposes of determining size eligibility for transfers and assignments . . . , we will use the most recently available audited financial statements in cases where the entity to whom the license is being transferred did not win a license in the original entrepreneurs' block auction.*¹⁸

It is readily apparent from this clarification that the Commission does not apply unjust enrichment penalties to an assignee or transferee that holds Block C or F licenses at the time of transfer/assignment, so long as the assignee/transferee qualified for the maximum bid credit at the time that it acquired those Block C or F licenses through the initial auction. While the Waiver Denial asserts that this is "contrary to the Commission's intent," such a conclusion is erroneous and unsupported.¹⁹ The plain language of the Fifth MO&O speaks for itself; it is not, as the Auctions Division suggests, simply an erroneous, out-of-context statement.

¹⁸ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Memorandum Opinion and Order, 10 FCC Rcd. 403, 468 (1994) (emphasis added) ("Fifth MO&O").

¹⁹ Moreover, Omnipoint questions how the Auctions Division, in the face of the plain language of the Fifth MO&O, can rely on another, as yet unpublished, "intent" of the Commission. In Omnipoint's view, where the Commission provides a written clarification in the language of paragraph 126 which is relied on by the parties to the initial Block C auction, then the Commission has, indeed, expressed its intent.

Further, the Auctions Division is mistaken because the position articulated in the Fifth MO&O is part of the fabric of the Commission's larger Entrepreneur's Band policy. This policy was designed to promote small business participation in the auctions and in wireless services by offering such businesses an incentive to grow and profit as they launch commercial wireless services to the public.²⁰ Thus, this policy embraces, out of necessity, the proposition that small businesses must be encouraged to grow; the "small business" eligibility restrictions cannot be applied in a manner that would doom the prospects of the small businesses' further success and growth. Otherwise, there is no incentive for small businesses to enter the wireless service at the initial auction stage of the service, since the same business could avoid growth associated with early deployment and enter the wireless service at a later, less risky, state of the market.

In the context of broadband PCS, the Commission has carried this policy forward in implementing all of its small business regulatory provisions, including the clarification on unjust

²⁰ Fifth R&O, ¶ 96 (Block C and F Entrepreneur provisions adopted "will also increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of broadband PCS service"); Fifth MO&O, ¶ 125 ("we will permit entrepreneur's block licensees to transfer their licenses . . . to other entrepreneurs' block licensees even if it would result in growth beyond the permissible gross assets and total revenues caps . . . We believe this encourages designated entities to grow, instead of penalizing them for their success . . ."). See also *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Tenth Report and Order, PP Dkt. No. 93-253, 11 FCC Rcd. 19974, 19983 (1996) (citing Fifth MO&O, 10 FCC Rcd. at 420). (Commission emphasized its "strong interest in seeing small businesses grow and succeed in the wireless marketplace and stated that growth of the licensee's gross revenues and assets . . . generally would not jeopardize continued eligibility for designated entity preferences.") See also *In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, Second Report and Order, 12 FCC Rcd. 19079,

(Footnote continued to next page)

enrichment cited above. For example, while the Commission requires Block C and F licensees to maintain eligibility demonstrated initially in the auction short-form application, the **“revenue from operations or other investments, business development or expanded service shall not be considered.”** 47 C.F.R. § 24.709(a)(3). Similarly, while the Commission limits Block C or F licensees to 98 licenses at auction, id., § 24.710(a), the rule permits post-auction aggregations exceeding 98 licenses in order to “strike the appropriate balance” and allow entrepreneurs “enough flexibility to develop competitive systems on a regional or nationwide basis.”²¹

Moreover, a transfer or assignment of a Block C or F license to another Block C or F licensee is permitted during the five-year anti-trafficking period, regardless of the assignee/transferee’s increased gross revenues since the time of its initial Block C or F license grant. Id., § 24.839(d). The unjust enrichment clarification carries forward this same overarching policy objective. Fifth MO&O, ¶ 126. Were the unjust enrichment provisions to operate as the Auctions Division suggests, the Commission’s careful policy balance would be lost -- small businesses would face a disincentive to grow their competitive wireless service and a disincentive to participate in the initial auction of the service. Indeed, the Auctions Division interpretation would seemingly encourage “front” licensees. Because the “unjust enrichment” rule was never intended by either Congress or the Commission to operate in that manner, the Fifth MO&O appropriately resolved this tension. See 47 U.S.C. § 309(j)(4)(B)(auction regulations shall “prevent stockpiling . . . of

(Footnote continued from previous page)

19173 (1997) (noting that normal projected growth of gross revenues and assets will not generally jeopardize small business eligibility).

spectrum by licensees . . . , and promote deployment of new technologies and services”) & (j)(4)(E) (auction rules are intended to “prevent unjust enrichment”).

Notwithstanding the Waiver Denial (at 3-4, n. 18), nothing in ¶ 127 of the Fifth MO&O contradicts the plain meaning of the clarification made in ¶ 126. At ¶ 127, the Commission clearly addressed a separate situation; it “reiterates” that the unjust enrichment rule applies if the assignor/transferor is found ineligible for any bid credit or if it is eligible for a lesser bid credit. Paragraph 127 does not address how to assess an assignor’s bid credit eligibility at the time the assignment application is filed (i.e., the use of two alternate standards: (1) the qualifications of the assignor at the time of filing, or, in the case of an assignor holding a Block C or F license, (2) the qualifications of the assignor at the time of its participation in the initial Block C or Block F auction). The Commission squarely addressed that issue in the preceding paragraph 126 of the order. Read together, paragraphs 126 and 127 provide straightforward guidance for Block C or F licensees in the transfer/assignment context. Where the assignor holds Block C or F licenses from the initial auction, it will be treated the same for unjust enrichment purposes as it was treated in that initial auction, regardless of subsequent growth. The Waiver Denial, however, for the first time and almost three years after the initial Block C auction, upsets this straightforward understanding of the unjust enrichment rule which, in Omnipoint’s view, eviscerates the essential economic incentives of the Entrepreneur’s Band.

(Footnote continued from previous page)

21 Fifth MO&O at ¶ 116.

The Auctions Division further contends that the Part 1 Third Report and Order²² “supplants” what the Auctions Division mischaracterizes as a “grandfathering exception” under the unjust enrichment rules. Omnipoint disagrees that the Part 1 Third Report and Order reverses the Commission’s Entrepreneur Band policies, as discussed above, and the specific clarification provided at ¶ 126 of the Fifth MO&O. In fact, as the Waiver Denial (at 3) acknowledges, the Part 1 Third Report and Order “conformed the new Part 1 rules to previously existing broadband PCS unjust enrichment rules.”²³ Therefore, the “supplanting” Part 1 rule must also embrace the prior clarification of the PCS rule that the Commission offered in the Fifth MO&O. Since the Fifth MO&O “clarified” the previous regulation consistent with Omnipoint’s understanding of the rule, it would be wholly arbitrary to now declare that the same regulatory language, moved to a different part of the Commission’s rules, holds the exact opposite meaning from what was explained in the Fifth MO&O.²⁴ The Part 1 Third Report and Order suggested no such radical

22 *Amendment of Part 1 of the Commission’s Rules, Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 374 (1998) (“Part I Third Report and Order”).

23 Part 1 Third Report and Order, at ¶ 3, Executive Summary (modification to Part 1 unjust enrichment rules were “to conform with the broadband PCS rules”), ¶ 52 (“We adopt our proposal to conform our Part 1 unjust enrichment rules to the broadband PCS rules. . . . The broadband PCS rules also address assignments and transfers between entities qualifying for different tiers of . . . bidding credits, thus supplying clearer guidance for auctions in which tiered . . . bidding credits are provided.”).

24 Indeed, as Omnipoint previously explained, the former broadband PCS rule is substantially identical to the current Part 1 rule. *Ex Parte* Letter of Mark J. Tauber and Mark J. O’Connor, Counsel for Omnipoint Corporation, to Ari Fitzgerald, Esq., dated Jan. 25, 1999 (filed in WT Dkt. No. 97-82) (Attached as “Exhibit C” hereto).

departure from the Commission's prior PCS policies and decisions.²⁵ Further, neither the Auctions Division nor the Commission may *sua sponte* reverse direction here on such a critical aspect of the Commission's Entrepreneur Band rules. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”).

Finally, Omnipoint notes that the current unjust enrichment rule, 47 C.F.R. § 1.2111(d)(1), does not support the Auctions Division's interpretation. Section 1.2111(d)(1) states that the unjust enrichment provisions on bid credits apply when the initial licensee “seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, [or] . . . that is eligible for a lower bidding credit.” The rule, however, does not specify how the assignee's/transferee's eligibility is to be evaluated. Thus, the Commission chose not to specify a Part 1 mechanism for assessing an assignee's eligibility and, instead,

²⁵ Part I Third Report and Order, ¶ 10 (Commission describes action as “minor rule changes” to Part I unjust enrichment provisions). For the same reasons, it is simply irrelevant that the Fourth R&O makes no mention of this aspect of the Commission's unjust enrichment rule. Cf., Waiver Denial at 3. The Fourth R&O was not addressed toward the unjust enrichment issue. Moreover, the Commission cannot be expected to either silently abandon or reiterate all of its policies in every rulemaking action.

continued to defer to service-specific rules on the process of evaluating eligibility.²⁶ Indeed, when the Commission chooses to specify the exact process for evaluating eligibility, it has done so. See 47 C.F.R. § 24.839(d)(2) (Block C or F license may be assigned during anti-trafficking period where proposed assignee “meets the eligibility criteria . . . at the time the application for assignment . . . is filed, or the proposed assignee . . . holds other license(s) for frequency blocks C and F and, at the time of receipt of such license(s), met the eligibility criteria . . .”). The level of generality left in the Part 1 unjust enrichment rule must mean that service-specific rules and precedent, not inconsistent with the general rule, continue to apply. Therefore, the revised Section 1.2111(d) and the Fifth MO&O work together in cases of broadband PCS assignments, and are not in conflict as the Auctions Division suggests.

For these reasons, Omnipoint respectfully submits that the Waiver Denial failed to take a “hard look” at the merits and “to give meaningful consideration” to the public interest factors supporting Omnipoint’s Waiver Request.²⁷

B. The Waiver Denial Failed To Adequately Consider the Special Circumstances Justifying a Waiver In This Case

As independent grounds for a waiver in this case, the Waiver Request explained that the special circumstances surrounding Omnipoint’s participation in Auction # 22 would render application of the Fourth R&O decision on bid credits inequitable, unduly burdensome, and

²⁶ This is consistent with the Part 1 Third Report and Order (at ¶ 18) not to impose uniform Part 1 eligibility rules across all wireless services, because the capital demands of wireless operators can vary significantly from service to service.

contrary to the public interest. Specifically, Omnipoint explained three circumstances warranting a waiver: (1) the delay caused by the Commission's Block C restructuring decisions which, in turn, deprived Omnipoint of eligibility for the maximum bid credit under the Commission's normal re-auctioning policies; (2) the unique harm to Omnipoint as the only Block C licensee that actually "out grew" the revenue caps due to its fulfillment of the Commission's PCS goals for rapid deployment; and (3) the Commission's commitment in its Block C restructuring orders that Block C participants would have meaningful participation in the re-auction and would be treated equitably in the restructuring process.

The Waiver Denial (at 4) erred in dismissing all three special circumstances. First, as explained above, the Commission's decision to defer the Block C payment obligations from March, 1997 until July, 1998 (which Omnipoint did not request) was chosen as a means to avoid massive Block C licensee default. Without such a deferral, the Commission's orders and pronouncements clearly called for expeditious re-auctioning of the spectrum formerly held by defaulting licensees.²⁸ Indeed, in response to 18 defaults after the close of the initial Block C auction, the Commission re-auctioned those licenses within one month of the defaults.²⁹ Thus,

(Footnote continued from previous page)

²⁷ Wait Radio v. FCC, 418 F.2d 1153, 1157, 1159 (D.C. Cir. 1969). See also Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154, 1161-62 (D.C. Cir. 1995).

²⁸ See Part 1 Third Report and Order, ¶152 (in cases of license default, "planned use of regularly scheduled quarterly auctions will ensure rapid reaction").

²⁹ See "18 Defaulted PCS Licenses to be Reauctioned, Reaction to Begin July 3," Public Notice, 11 FCC Rcd. 22204 (WTB 1996) (default of 18 Block C licenses occurred on May 15, 1996 and short-form applications were due on June 14, 1996 for re-auction of those licenses).

without deferral and restructuring, the spectrum would have been re-auctioned in a timely manner in 1996 and certainly no later than 1997. As Omnipoint's gross revenues on file with the Commission demonstrate (see, p. 5, infra.), Omnipoint would have qualified for the maximum bid credit under the \$15 million "very small business" standard if the Commission had re-auctioned the Block C spectrum on a timely basis, in 1996 or in 1997, or even if the Commission had waited until early 1998.³⁰ Instead of holding back its system deployment during that uncertain period, however, Omnipoint actualized the Commission's express policy goals for rapid deployment of competing PCS systems during this time. In doing so, Omnipoint should not be penalized as a direct result of the Commission's intervention in the spectrum re-allocation process through deferral and restructuring of Block C payment obligations. See Second R&O, 12 FCC Rcd. at 16463 (Restructuring process must be "fair to those licensees that have rapidly built-out their markets and initiated [the] provision of competitive service.").

The Waiver Denial fails to address this special circumstance justifying the waiver. Instead, the Auctions Division's position is nonresponsive to the issue presented, and oddly asserts that the Commission's restructuring orders "did not attempt to place . . . prior participants in the same position as they would have occupied had the initial C Block auctions not occurred." Id. at 4. As explained above, Omnipoint never asked for the Commission to treat it as if the initial Block C auctions had not occurred, nor is Omnipoint asking here for the Commission to reverse its restructuring decisions. Rather, Omnipoint believes that the Commission's highly

30 See, n. 5, infra.

unusual intervention in the restructuring process had a significant and direct impact on Omnipoint's ability to acquire Block C licenses in Auction #22, which the Commission should now rectify.

Further, a waiver is warranted in this case because the decision of the Fourth R&O would apply to Omnipoint and no other bidder in Auction # 22. The Waiver Denial (at 3) dismissed this argument on the basis that the disparate impact of the rulemaking decision "is impossible to test at this time." However, it is easily and readily tested with a simple review of where the Block C auction winners stand today, which patently demonstrates Omnipoint's unique position – there are no winners of other Block C licenses in the original Auction whose revenues now exceed the average gross revenue cap of \$15 million due to having launched and grown a PCS business. The dismissal on that basis defies the common industry knowledge of the relative success of Block C participants, which Omnipoint is certain that the Auctions Division and the Commission possess. Moreover, Omnipoint has challenged the efficacy of the underlying Fourth R&O decision in its October 23, 1998 Petition for Reconsideration. To date, as the Auctions Division well knows, no party has commented - in support or opposition - on Omnipoint's reconsideration or waiver requests, which strongly suggests that no other party is similarly situated. Finally, the "very small business" status of the current applicants in Auction # 22, as discussed at 9, above, confirms that Omnipoint is uniquely penalized for its Entrepreneurial growth relative to other bidders in the auction.

Finally, the Waiver Denial (at 3) contends that the restructuring decisions left Omnipoint with "no reasonable basis on which to expect that it would automatically qualify in upcoming C Block auctions for the same level of bidding credits for which it previously had been eligible."

Omnipoint's review of the restructuring decisions, however, indicates that it was, in fact, left with every expectation that it would be treated fairly in the restructuring process, including a right to re-bid its amnestied licenses, and that it would not be penalized due to its growth as an operational licensee.³¹ Omnipoint surely has a legitimate expectation that the Commission will find, in this waiver request, that the equitable Block C restructuring initiated two years ago requires further remedial action in this case.

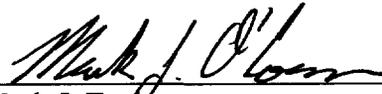
³¹ See discussion at pp. 7-8, infra. Indeed, at the time of the Second R&O, former Chairman Hundt expressed concern that the Commission should do more to “treat fairly those C block companies – such as Omnipoint . . . – that have accepted our challenge to bring service to market and who, as a result, have invested heavily in build out.” Second R&O, Affirming and Dissenting Separate Statement of Chairman Reed E. Hundt, at 6.

V. Conclusion

For the foregoing reasons, and as articulated in its Waiver Request, Omnipoint respectfully asks the Commission to grant the Waiver Request by the start of bidding (March 22) and permit Omnipoint to participate in the ongoing Auction # 22 as a "very small business" entitled to a 25% bid credit on Block C licenses.

Respectfully submitted,

OMNIPOINT CORPORATION



Mark J. Tauber
Mark J. O'Connor

Piper & Marbury L.L.P.
1200 Nineteenth Street, N.W., Suite 700
Washington, D.C. 20036
(202) 861-3900

Its Attorneys

Date: March 15, 1999

EXHIBIT A



Federal Communications Commission
Washington, D.C. 20554

February 12, 1999

DA 99-332

Mark J. Tauber, Esq.
Piper & Marbury L.L.P.
1200 19th Street, N.W.
Seventh Floor
Washington, DC 20036

Dear Mr. Tauber:

This letter is in response to a request filed on behalf of Omnipoint Corporation ("Omnipoint")¹ for a waiver of Section 24.712 of the Commission's rules.² Omnipoint asks that its eligibility for size-based bidding credits in the upcoming broadband PCS auction (Auction No. 22) be based upon its average gross revenues for the three years preceding its application for the initial C block PCS auction. In effect, Omnipoint asks that its business size at the time of a prior C block auction be "grandfathered" for purposes of bidding credits. Omnipoint indicates that grant of a waiver would enable it to qualify as a very small business under the Commission's rules. For the reasons discussed below, we deny Omnipoint's waiver request.

In the *C Block Fourth Report and Order*, the Commission decided that all entities that had been eligible for and had participated in either of the prior C block auctions would be eligible to participate in C block auctions that begin within two years of the start date of the next C block auction (Auction No. 22), without regard to the current size of such entities.³ The Commission, however, expressly declined to "grandfather" eligibility for bidding credits, deciding that bidding credit eligibility in upcoming C block auctions would be determined at the deadline for filing short-form applications.⁴ The Commission concluded that it would not be in the best interests of the public and, in particular, of competing small business bidders and licensees to provide a discount to applicants that no longer meet the small business size standards.⁵

¹ Omnipoint Corporation, *Request for Rule Waiver* (filed January 29, 1999) ("*Waiver Request*").

² Section 24.712 states that a winning C block bidder that is a "small business" may use a bidding credit of 15 percent to lower the cost of its bid and that a winning C block bidder that is a "very small business" may use a bidding credit of 25 percent to lower the cost of its bid. 47 C.F.R. § 24.712. Under Section 24.720(b) of the Commission's rules, a small business has average annual gross revenues not exceeding \$40 million for the preceding three years; whereas, a very small business has average annual gross revenues not exceeding \$15 million for the preceding three years. 47 C.F.R. § 24.720(b); see 47 C.F.R. § 1.2110(e)(2)(ii), (iii).

³ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Fourth Report and Order*, FCC 98-176, 13 FCC Rcd. 15,743, 15,751-52, paras. 13, 15 (1998) ("*C Block Fourth Report and Order*"); see 47 C.F.R. § 24.709(b)(9)(i).

⁴ *C Block Fourth Report and Order* 13 FCC Rcd at 15,768, para. 47.

⁵ *Id.*

Mark J. Tauber, Esq.
February 12, 1999

In order to obtain a waiver of the Commission's size eligibility standard, Omnipoint must show either "(i) that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or (ii) that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest."⁶ We find that Omnipoint fails to satisfy either aspect of this requirement.

Omnipoint argues first that the underlying purpose of the rule would not be served by its application in this case because the gross revenues standard for eligibility as a small or very small business does not effectively shield competing bidders from competitors with access to large amounts of capital.⁷

We disagree. The Commission has said that "average gross revenues provide an accurate, equitable, and easily ascertainable measure of business size."⁸ Moreover, in determining eligibility for size-based provisions, Commission rules require aggregation of the gross revenues of the applicant, its affiliates, those with attributable interests in the applicant, and their affiliates.⁹ In establishing this eligibility standard, the Commission has endeavored to define legitimate small businesses, while at the same time enabling them to raise sufficient capital to compete at auction and in the provision of telecommunications services to the public.¹⁰ Omnipoint's argument that other bidders will not be harmed by grant of its waiver request is merely an untested assertion and does not show that application of the rule in this case will undercut the rule's purpose.

Omnipoint next suggests that application of the rule here would not serve its underlying purpose because Omnipoint could obtain the benefit of a very small business bidding credit in a secondary market transaction, even if it would not be able to obtain the benefit directly at Auction No.

⁶ 47 C.F.R. § 24.819. As of February 12, 1999, Section 24.819 is superseded by Section 1.925, which contains essentially the same standard for granting a waiver. 63 FR 68,904 (December 14, 1998).

⁷ *Waiver Request* at 6-9.

⁸ Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, at 388-89, para. 19 ("*Part 1 Third Report and Order*").

⁹ 47 C.F.R. § 24.720(b).

¹⁰ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, FCC 94-61, 9 FCC Rcd 2348, 2395-96, paras. 266-73 (1994); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, FCC 94-178, 9 FCC Rcd 5532, 5601-02, para. 159 (1994) ("*Fifth Report and Order*"); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, FCC 94-285, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 438-39, 441, paras. 62, 66-77 (1994) ("*Fifth Memorandum Opinion and Order*").

Mark J. Tauber, Esq.
February 12, 1999

22.¹¹ Omnipoint claims that in the *Fifth Memorandum Opinion and Order*,¹² the Commission established an exception to the Commission's bidding credit unjust enrichment rules for transfers to entities that hold other entrepreneurs' block licenses and thus, at the time of the initial C or F block auction, satisfied the entrepreneurs' block criteria. Thus, Omnipoint asserts it could obtain the benefit of a transferor's bidding credit in the form of a reduced transfer price.

Omnipoint's belief in the existence of such an exception is misguided. The applicable rules do not provide for such an exception. In the *Part 1 Third Report and Order*, the Commission established that both future and existing licensees are to be governed by new Part 1 unjust enrichment rules, including bidding credit unjust enrichment provisions.¹³ While the Commission conformed the new Part 1 rules to previously existing broadband PCS unjust enrichment rules,¹⁴ it made clear that the Part 1 rules would supplant existing service-specific unjust enrichment rules, including those for broadband PCS.¹⁵ There is no mention in the *Part 1 Third Report and Order* or the Part 1 rules of a grandfathering exception to the bidding credit unjust enrichment provisions.

Further, in the *C Block Fourth Report and Order*, the Commission reminded applicants that unjust enrichment provisions would continue to apply to C block licensees that utilize a bidding credit and, during their initial license term, seek to make a change in the ownership or control of a license that would result in the license's being owned or controlled by an entity that does not meet the same eligibility criteria for a bidding credit.¹⁶ The *C Block Fourth Report and Order*, which so thoroughly discusses the grandfathering exception to the entrepreneurs' block eligibility requirement, makes no reference to a grandfathering exception to bidding credit unjust enrichment obligations.

Omnipoint's argument is based entirely on its interpretation of one sentence in the *Fifth Memorandum Opinion and Order* discussing the application of unjust enrichment rules in the event a licensee transfers entrepreneurs' block licenses.¹⁷ However, this interpretation is contrary to the

¹¹ *Waiver Request* at 9-11.

¹² *Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 468, para. 126.

¹³ *Part 1 Third Report and Order*, 13 FCC Rcd at 407, para. 53.

¹⁴ *Id.* at 406, para. 52.

¹⁵ *Id.* at 407, para. 53.

¹⁶ *C Block Fourth Report and Order* 13 FCC Rcd at 15,769, para. 48.

¹⁷ "[W]e clarify that between years four and five we will allow licensees to transfer a license to any entity that either holds other entrepreneurs' block licenses (and thus at the time of auction satisfied the entrepreneurs' block criteria) or that satisfies the criteria at the time of transfer. **Unjust enrichment penalties (as described above) apply if these requirements are not met, or if they qualified for different provisions at the time of licensing.**" [emphasis added]

Mark J. Tauber, Esq.
February 12, 1999

Commission's intent and, indeed, is contradicted in the next paragraph of the same order.¹⁸

Omnipoint finally attempts to demonstrate that special circumstances necessitate that we grant its waiver request.¹⁹ It states that it is the only C block licensee that has outgrown its prior bidding credit eligibility. It argues that the Commission is responsible for the delays in auctioning available C block spectrum, absent which Omnipoint would still qualify as a very small business. Finally, Omnipoint protests that it made its June 1998 election decisions based on the Commission's promise of a meaningful opportunity to participate in the next C block auction.

We find these arguments unpersuasive. It is impossible to test at this time, Omnipoint's assertion that it is the only C block licensee affected by the eligibility rule at issue, which is neutral on its face. While the Commission attempted in its restructuring orders to address the many concerns of participants in the prior two C block auctions, it did not attempt to place -- and indicated that it would not place -- prior participants in the same position they would have occupied had the initial C block auctions not occurred.²⁰ Omnipoint had no reasonable basis on which to expect that it would automatically qualify in upcoming C block auctions for the same level of bidding credits for which it previously had been eligible.

For these reasons, we must adhere to the Commission's decision not to "grandfather" bidding

Fifth Memorandum Opinion and Order, 10 FCC Rcd at 468-69, para. 126. Omnipoint relies on the bolded language while ignoring the remainder of the sentence. See *Ex Parte* Letter of Mark J. Tauber and Mark J. O'Connor, Counsel for Omnipoint Corporation, to Ari Fitzgerald, Esq., FCC, dated January 25, 1999 (filed in WT Docket No. 97-82).

¹⁸ See *Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 469, para. 127:

[W]e reiterate that if a designated entity transfers or assigns its license before year five to a company that qualifies for no bidding credit, then such a sale will entail full payment of the bidding credit as a condition of transfer. If, however, the same transaction occurs (during the same time frame), but the buyer is eligible for a lesser bidding credit, then the difference between the bidding credit obtained by the seller and bidding credit for which the buyer would qualify, must be paid to the U.S. Treasury for the transaction to be approved by the FCC.

See also *id.* at 466, para. 119; *Fifth Report and Order*, 9 FCC Rcd at 5591, para. 134 (The Commission adopts the bidding credit unjust enrichment rule with no mention of grandfathering a licensee's eligibility for bidding credits.).

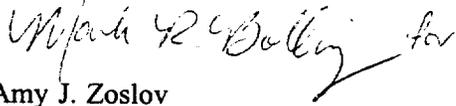
¹⁹ *Waiver Request* at 11-14.

²⁰ See, e.g., Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8359, para. 36 (1988) ("If we were to allow C block licensees to return their licenses, receive a refund of their down payments, and participate in the reaction, we would undermine the integrity of the auction process by placing amnesty licensees in virtually the same position they would have occupied had the initial C block auction never taken place.").

Mark J. Tauber, Esq.
February 12, 1999

credit status from prior C block auctions in Auction No. 22. We deny Ominpoint's request for a waiver of Section 24.712. We will evaluate Ominpoint's eligibility for bidding credits according to its qualifications at the deadline for short form filing.

Sincerely,

A handwritten signature in cursive script, appearing to read "Amy J. Zoslov for".

Amy J. Zoslov
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

EXHIBIT B